Supreme Court, U.S.
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No. 03-1238

IN THE

Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

As IBP, inc. ("IBP") explained in its petition, this case presents two fundamental and recurring questions of federal law, both of which are ripe for the Court's consideration.

1.a. There is an acknowledged and irreconcilable conflict among the courts of appeals on the important issue of whether employees are entitled to compensation under the Portal Act for "walking time" between arguably compensable pre- and post-shift clothes-changing and the actual work station. See Pet. 11-17. Since the petition was filed, that split has become even more definitive. The First Circuit recently released its opinion on rehearing in *Tum* v. *Barber Foods, Inc.*, in which it affirmed its earlier decision that such "walking time is not compensable." 360 F.3d 274, 281 (1st Cir. 2004). In a concurring opinion, Chief Judge Boudin expressly "juxtaposed" the conflicting positions of the circuits, explaining that the First Circuit has now aligned itself with the Fifth and Tenth Circuits—and in opposition to the Ninth Circuit's decision in this case—in holding that the walking time at issue here is not compensable. *Id.* at 285 & nn.9 & 10 (Boudin, C.J., concurring) (citing *Reich* v. *IBP, Inc.*, 38 F.3d. 1123, 1127 (10th Cir. 1994), and *Anderson* v. *Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 563 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002)).

Notwithstanding this plain and acknowledged conflict, respondents contend that there is no real, developed split. Their suggestion that the decisions of the Ninth and Tenth Circuits are "fully consistent," Opp. 11-13, is wishful thinking. In *Reich*, the Tenth Circuit did not merely describe the district court's ruling that the time for which workers should be paid is "*not* to include '. . . walk time,'" *Reich* v. *IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir. 1994) (emphasis added), it expressly *affirmed* that ruling. See *id.* ("[w]e affirm . . . the *denial of* '. . . walk time'" that occurs post-

donning and pre-doffing) (emphasis added). In his concurring opinion in *Tum*, Chief Judge Boudin likewise recognized that *Reich* "uphold[s] the denial of 'walk and wait' time related to donning and doffing" and thus directly conflicts with the Ninth Circuit's holding below. 360 F.3d at 285 n.10 (Boudin, C.J., concurring).[1] Not only is respondents' attempt to reconcile the holdings of the Ninth and Tenth Circuits completely untenable, it simply ignores the irrefutable split of authority between the decision below and the decisions of the First (and Fifth) Circuits.

Respondents' contention that the walking time issue is too "fact-bound" to generate a split of authority is equally baseless. Opp. 11, 13. The compensability of walking time that occurs between compensable clothes-changing and the work station is a pure question of law. The answer to that legal question turns on the meaning of a statute, not on any factual variations in the industrial settings in which the issue may arise. Thus, while the *amount* of time employees spend walking between compensable clothes-changing and the work station may vary according to the industry and the particular configuration of a plant, the *compensability* of such time depends entirely on the proper construction of the Portal Act.

Nor is it true that the current split is "[i]mmature." Opp. 13, 15 n.10 (suggesting that an unspecified "intermediate position" may yet develop in the circuits). The "walking time" issue already has received detailed attention and definitive resolutions from a number of circuits, including a

[1] Contrary to respondents' claim, the district court's separate holding that travel from the knife room to the work station is compensable, *Reich* v. *IBP, Inc.*, 3 Wage & Hour Cas. 2d (BNA) 324, 329 (D. Kan. 1996), *aff'd on other grounds*, *Metzler* v. *IBP, Inc.*, 127 F.3d 959, 963, 966 (10th Cir. 1997), does not eliminate this clear conflict. That issue was neither appealed nor discussed in the Tenth Circuit's affirmance, and thus in no way alters the Tenth Circuit's express holding in *Reich* that walking time that occurs post-donning and pre-doffing—the very walking time at issue in this case—is not compensable.

disposition on rehearing in the First Circuit. Given the existing and acknowledged disagreement among the courts of appeals, there is no emerging "'right' answer short of" this Court's involvement. 360 F.3d at 283 (Boudin, C.J., concurring).[2]

It is clear, moreover, that the Ninth Circuit's isolated view is *not* the "right" answer. In his thoughtful concurrence in *Tum*, Chief Judge Boudin explained that the Ninth Circuit's analysis improperly "combin[es] *Steiner*'s verbal formula—'integral and indispensable'—with another settled principle: that once the workday has begun with the first principal activity, anything else until the workday ends is compensable unless the employee is essentially on his own." *Tum*, 360 F.3d 284-85. This approach "undermin[es] Congress's purpose in the Portal-to-Portal Act, which (with rare exceptions) sought to exclude preliminary and postliminary waiting and walking time from compensability," *id.* at 281, and is inconsistent with the Act's legislative history, which provides "examples of events excluded from compensable work—such as time spent waiting to punch in and time spent walking from plant gate to work bench—that appear at odds" with the Ninth Circuit's interpretation. *Id.* at 285 (Boudin, C.J., concurring). The majority opinion also concluded that the Ninth Circuit's approach leads to "absurd result[s]." See *id.* at 280-81.

Contrary to respondents' claim, nothing in this Court's decision in *Steiner* justifies the decision below. Opp. 17-19. "*Steiner* concerned only time spent in the donning and doffing of special protective equipment" and "did not purport to say that all time walking" with respect to that donning and doffing is compensable. *Tum*, 360 F.3d at 281 n.5. Indeed, as petitioner previously explained, *Steiner*'s statement that time

[2] The circuits' differing focuses on the various interpretive regulations and legislative history, Opp. 13-15, further emphasizes the difficulty they have experienced in finding a single answer to the walking time question.

is compensable if it is (1) spent on activities that are "'integral and indispensable'" to principal activities and (2) not excluded by Section 4(a), necessarily excludes the walking time at issue here. See Pet. 13. In all events, any question about "how far *Steiner* has qualified the statute" is a matter that only this Court can finally resolve. *Tum*, 360 F.3d at 286 (Boudin, C.J., concurring).

Respondents' contention that the "walking time" issue "does not present an issue of significant national importance" requiring the Court's review, Opp. 15, defies belief. As Chief Judge Boudin observed, the kind of expansive interpretation adopted by the Ninth Circuit here "bear[s] an uncanny resemblance to that which prompted the Portal-to-Portal Act." 360 F.3d at 286. As detailed in the petition, in enacting the Portal Act, Congress found that a breathtaking array of harms can attend uncertainty and overbreadth concerning the compensability of "walking time," including the "financial ruin of many employers"; "extended and continuous uncertainty on the part of industry"; "gross inequity of competitive conditions between employers and between industries"; "interfere[nce] with" "voluntary collective bargaining"; as well as courts nationwide "be[ing] burdened with excessive and needless litigation." 29 U.S.C. § 251(a). The submission of the *amicus* brief by the the National Chicken Council, the American Meat Institute, and the National Association of Manufacturers confirms that the question presented in this case has wide-ranging importance for all employees and their employers whose expectations are undermined and upset by uncertainty about the compensation requirements of federal law.

b. Unable to cast doubt on the important and acknowledged circuit split presented here, respondents suggest—for the first time in this litigation—that review should be denied because the federal "walking time" issue will have no impact on the judgment: "[r]egardless of any ruling in this Court on the issues raised by IBP, the plaintiffs herein will recover all

of their damages *under state law*." Opp. 9. This assertion is wrong.

Even if respondents' state and federal claims do overlap and respondents ultimately elect to collect damages under the former, that election will not in any way alter or eliminate the judgment for which petitioner seeks review. Whether or not respondents ultimately collect damages as to the federal "walking time" claims, the Ninth Circuit has entered a legal judgment that petitioner failed to comply with these requirements of federal employment law. See generally *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) ("prevailing party" is a legal term of art defined as "'[a] party in whose favor a judgment is rendered, *regardless of the amount of damages awarded*'") (emphasis added) (quoting *Black's Law Dictionary* 1145 (7th ed. 1999)). That judgment will have res judicata and collateral estoppel effects on IBP regardless of whether respondents elect not to avail themselves of any damages awarded as part of that judgment, and will be the law of the Ninth Circuit, binding on all employers within its geographic scope across a range of industries.[3]

The Ninth Circuit's judgment on this issue of federal law, therefore, will have binding legal effects on petitioner. And the judgment conflicts with the rule that would be applicable in the First and Tenth (as well as Fifth) Circuits. Accordingly, this is very much a live controversy and any election respondents might subsequently make does not render the judgment unreviewable.

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[3] The rule that this Court does not review *state* court judgments that rest on "an independent and adequate state law ground," Opp. 10, is wholly inapplicable. That rule is based on principles of federalism, *see Coleman* v. *Thompson*, 501 U.S. 722, 726 (1991), which have no bearing where, as here, review is sought of a federal court's disposition of an issue of federal law.

2. Respondents do nothing to challenge petitioner's core showing that there is substantial confusion in the circuits on the important and far-reaching question of the degree of deference due less formal agency interpretations. As petitioner showed, and respondents do not dispute, numerous courts and commentators are openly seeking guidance about the degree of deference owed "less formal" agency interpretations such as the Opinion Letter at issue here. Pet. 19-25. Contrary to respondents' claims, this case is an appropriate vehicle for addressing this important issue.

Respondents' suggestion that the Ninth Circuit avoided this confusion by applying *Skidmore* "principles," Opp. 22, only confirms that the deference question petitioner raises is properly presented in this case. The fundamental question that has spawned widespread confusion in the lower courts is *whether* the appropriate standard of deference is that set forth in *Skidmore* where, as here, an agency has addressed statutory ambiguity through less formal means. Thus, arguing that the Ninth Circuit applied *Skidmore* deference begs the question; it does not obviate the need to resolve this fundamental issue of administrative law.

In fact, however, because the agency's 2002 Opinion Letter withdrew a 1997 Opinion Letter, the Ninth Circuit afforded the agency's current 2002 Opinion Letter no deference at all. Pet. App. 17a n.9. Had it properly applied *Skidmore*, the Ninth Circuit would have considered the change in agency position as but one of many factors bearing on the appropriate degree of deference due the 2002 Opinion Letter, and would have had to consider the carefully reasoned arguments the 2002 Opinion Letter gave for withdrawing the prior Opinion Letters. Conversely, under *Chevron*, because an agency may have a range of reasonable choices "not instantly carved in stone," but subject to reconsideration "on a continuing basis," under this more deferential standard of review, the 2002 Opinion Letter's interpretation of Section 3(*o*) would have prevailed. *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863-64 (1984). Thus, the confusion about the proper standard to apply controlled the outcome below.

Nor is there any merit to respondents' contention that the degree of deference due the 2002 Opinion Letter was not raised or decided below. Opp. 19-20. As the Court has explained, review is appropriate where the court of appeals "decided the substantive issue presented." *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented."). Here, the degree of deference owed the 2002 Opinion Letter was briefed to the Ninth Circuit,[4] which decided the issue. Indeed, as respondents concede, the court below "considered the interpretations" of the statutory provision in the 2002 and 1997 Opinion Letters, cited an agency-deference case from this Court, and "rejected" the 2002 Opinion Letter, Opp. 21-22, determining that it was entitled to no deference because it was a "new, inconsistent interpretation," Pet App 17a n.9. In seeking rehearing, petitioner cited cases from the *Chevron* line and argued that the Ninth Circuit erred in failing to give "substantial deference" to the 2002 Opinion Letter. Opp. App. 42a-43a. The Ninth Circuit declined to correct this error. Pet. App. 84a. Accordingly, there can be no doubt that the degree of deference due the 2002 Opinion Letter was raised and addressed below. See *Richards* v. *Jefferson*

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[4] To give the misimpression that this issue was not raised below, respondents misleadingly focus on petitioner's June *3*, 2002 opening brief, Opp. 5-6, 20, which was filed three days *before* the June *6*, 2002 Opinion Letter was issued. In the briefing that followed issuance of the 2002 Opinion Letter, the parties addressed the interplay of the 2002 and 1997 Opinion Letters and the degree of deference owed to them, Opp. 20, with respondents arguing that the Opinion Letters were entitled to deference according to "their own persuasive force," Opp. App. 26a, and petitioner noting the "importance" of the 2002 Opinion Letter and arguing that the withdrawn 1997 Opinion Letter was entitled to no weight, *id.* at 37a.

County, Ala., 517 U.S. 793, 797 n.3 (1996) (issue raised on rehearing below "has been preserved for our review").[5]

Rather than confront the indisputable confusion in the circuits over the degree of deference due less formal agency interpretations, respondents focus on whether there is a circuit conflict over the proper interpretation of the underlying statutory term at issue here. But it is the widespread confusion—and the appeals for guidance—in the lower courts that warrant review of the second question presented. In all events, as petitioner pointed out, the Ninth Circuit's determination that certain attire worn in the meatpacking industry does not constitute "clothes" under Section 3(*o*) created a conflict with the Fifth Circuit's decision in *Bejil* v. *Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001) (per curiam). Pet. 18. Although the Fifth Circuit was not faced with the identical protective gear at issue here, it rejected as "nonsensical" the claim that "sanitary garments . . . are not 'clothes' under § 203(*o*)." *Bejil*, 269 F.3d at 480 n.3. Its plain-meaning approach to the interpretation of the term "clothes" in Section 3(*o*) cannot be reconciled with the Ninth Circuit's interpretive approach, which ignored dictionary definitions and instead relied on interpretive principles applicable to statutory exemptions.[6]

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[5] Respondents note that petitioner did not cite all of the same cases below that it identified in its petition. Opp. 19-20. But even when a petitioner does not make the "exact argument below" that is pressed before this Court, review remains appropriate where, as here, the general issue was raised, especially "[g]iven the importance of the issue" presented. *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 678 n.27 (2001). As petitioner has shown, Pet. 18-25, the proper standard for agency deference is indisputably "in a state of evolving definition and uncertainty, and one of importance to the administration of federal law," *Virginia Bankshares, Inc.*, 501 U.S. at 1099 n.8 (internal quotations and citation omitted)—a showing respondents nowhere refute.

[6] Indeed, a number of courts have had no difficulty concluding that the gear worn by meatpacking employees are "clothes." *See, e.g., Saunders* v. *John Morrell & Co.*, No. C88-4143, 1991 WL 529542, at *1, *4 (N.D. Iowa Dec. 24, 1991) (Section 3(*o*) applies to exclude time spent by meatpacking employees in changing into and out of "steel-mesh gloves, synthetic-mesh gloves, goggles, helmets, arm guards, belly guards, knife and cut resistant gloves, knife guards, steel-toed shoes, rubber boots, rubber gloves, rubber aprons, and steel-mesh aprons"); *Nardone* v. *General Motors, Inc.*, 207 F. Supp. 336, 338, 340 (D.N.J. 1962) (time spent by metal finishers in changing into and out of "coveralls, gloves, aprons, goggles and hoods" excluded from compensation by Section 3(*o*)).

Finally, there is no merit to respondents' defense of the Ninth Circuit's construction of the statute. As petitioner has explained, the Ninth Circuit rejected out of hand the dictionary definition of "clothes" as overbroad, relying instead on its colloquial observation that the "admonition to wear warm clothing, for example, does not usually conjure up images of donning a bullet-proof vest or an environmental spacesuit." Pet. App. 16a. In addition, the Ninth Circuit improperly treated the Section 3(*o*) exclusion as an exemption, relying heavily upon the general, but inapplicable, notion that exemptions are permitted only when there is a plain fit. *Id.* And, the "other regulations of the Secretary of Labor" to which respondents refer, Opp. 21, are the OSHA regulations addressed in the petition that, in fact, *include* protective gear as a *subset* of clothing. See 29 C.F.R. § 1910.1030(b). Accordingly, there was no justification for the Ninth Circuit's decision to exclude protective attire from the ambit of "clothes."

CONCLUSION

For the foregoing reasons and those stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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